

**UNITED STATES DISTRICT COURT
DISTRICT OF MAINE**

JOSEPH H. GREENIER,)	
)	
Plaintiff,)	
)	
v.)	Civil no. 00-9-B
)	
CHAMPION INTERNATIONAL CORP.)	
)	
Defendant.)	

ORDER AND MEMORANDUM OF DECISION

SINGAL, District Judge

Plaintiff Joseph H. Greenier, appearing pro se, brings claims against Defendant Champion International Corporation for wrongful termination under the American with Disabilities Act (“ADA”), 42 U.S.C. §§ 12101-12117. Before the Court is Plaintiff’s Motion to Amend the Scheduling Order and to Compel Production of Documents, and Defendant’s Motion to Dismiss for insufficiency of service of process and failure to obey a Court Order pursuant to Fed. R. Civ. P. 12(b)(5) and 41(b). For the reasons discussed below, Plaintiff’s Motion is DENIED and Defendant’s Motion is GRANTED.

I. BACKGROUND

Greenier filed suit on January 20, 2000. On May 18, 2000, Greenier moved for an extension of time to serve Champion International with the Complaint. Also that day, the Court Clerk sent to Greenier a completed summons, a notice and acknowledgement form, and a letter, in which the Court Clerk wrote, “You may serve the complaint with the summons and this notice by Certified Mail if you so desire.” (Pl. Resp. to Mot. to

Dismiss, Attach. A, Docket #14.)

On June 14 and June 17, 2000, Greenier sent to four persons associated with Champion International, via certified mail, a copy of the Complaint, the summons and the notice form.¹ Champion never sent back a completed notice form. No proof of service of process has been filed with the Court.

On June 22, 2000, the Magistrate granted Plaintiff's motion and extended the deadline for service to July 21, 2000.

In its Answer, filed July 5, 2000, Defendant raises insufficiency of process as an affirmative defense.

II. DISCUSSION

Fed. R. Civ. P. 4 specifies the procedures for plaintiffs to serve complaints upon defendants. To properly serve a complaint upon a corporate defendant, a plaintiff has two options: delivery of service as specified in Fed. R. Civ. P. 4(c)(2), 4(e)(1) and 4(h), or waiver of service as specified in Fed. R. Civ. P. 4(d). Plaintiffs must either deliver process upon a corporate officer or agent authorized by appointment or law to accept service, or send a waiver form and copy of the complaint to the defendant via first-class mail. If the defendant chooses to waive formal service, it may complete and return the waiver form, thereby releasing plaintiff from its duty to formally serve process.

Defendant, however, has the option of not returning a waiver form. Rather, a defendant

¹ Specifically, on June 14, 2000 Plaintiff mailed a copy of the Complaint, the summons and the notice form to Fred Oettinger, an officer of Champion International, and to the United States Corporation Company, Champion's registered agent for service of process. (Pl. Am. to Resp. to Mot. to Dismiss & Am. to Reply to Mot. to Compel, Attach. A, Docket #15.) On June 17, 2000, Plaintiff mailed copies of the same three documents to Richard E. Olson, another of Champion's officers, and to John Dillon, an officer of Champion's new parent company, International Paper. (See Def. Mot. to Dismiss, Attach. A, Docket #12.)

may ignore the waiver form, necessitating the plaintiff to serve process formally.

Plaintiff did not deliver service to Defendant, and Plaintiff did not send a waiver form. Apparently attempting to use outdated rules of procedure, Plaintiff sent an antiquated notice and acknowledgment form (the precursor to the waiver form) and anticipated that Defendant would complete and send back the form, thereby effectuating completed service. See Fed. R. Civ. P. 4(c)(2)(C)(ii) (repealed).² Defendant chose not to return the notice form, implicitly insisting on formal service. Under both the old rule and the new rule, a defendant may ignore a notice form or a waiver form.

The July 21st deadline for effecting service passed. Prior to and since that date, no proof of service of process has been filed with the Court. Because Plaintiff failed to comply with Fed. R. Civ. P. 4 by the deadline, Plaintiff has failed to sufficiently serve process upon Defendant.

Plaintiff argues that mailing the summons with the notice and acknowledgement form should suffice as proper service of process, because the May 18th letter from the Clerk of the Court stated that Plaintiff could send to Defendant the process and the notice form via certified mail. First, the May 18th letter does not state anything to the effect that if Defendant were to ignore the notice form, that would sufficiently complete service. In fact, the notice form that Plaintiff mailed states that if Defendant does not complete and return the form, the consequence is that Defendant would have to pay the expenses incurred in serving the summons and complaint. (Def. Mot. to Dismiss, Attach. B, Docket #12.) The notice form does not state that failure to return the form would constitute sufficient service.

² Under the old rule, if a defendant ignored the notice and acknowledgement form for twenty days, service was incomplete, and the plaintiff would have to serve the defendant formally. See Fed. R. Civ. P.

Second, even if the Court Clerk had provided Plaintiff with erroneous advice, that would not constitute grounds to find that sufficient service was made. See United States v. Heller, 957 F.2d 26, 31 (1st Cir. 1992) (holding that reliance on court personnel's erroneous advice did not constitute unique circumstances permitting appellant to file after deadline).

Furthermore, actual notice does not alter the fact that there was insufficiency of process. See Media Duplication Servs., Ltd. v. HDG Software, Inc., 928 F.2d 1228, 1233-34 (1st Cir. 1991). Even though Defendant is now aware of Plaintiff's Complaint (as evidenced by Defendant's Answer) that does not obviate the procedural requirement for service of process. Because Plaintiff has insufficiently served Defendant, Plaintiff's Complaint must be dismissed.

By failing to effectuate proper service of process, Plaintiff failed to comply with the June 22nd Court Order. See Fed. R. Civ. P. 41(b) (failure to comply with court order constitutes grounds for dismissal); Figueroa Ruiz v. Alegria, 896 F.2d 645, 649 (1st Cir. 1990) (same).

The Court does not address Defendant's argument that Plaintiff's claims are time-barred.

Finally, dismissal renders moot Plaintiff's Motion to Amend the Scheduling Order and to Compel Production. In Plaintiff's Motion to Amend the Scheduling Order, Plaintiff requests a two-month time extension. Even if the Court were to extend the July 21st deadline by two months, Plaintiff still failed to sufficiently serve process upon Defendant by September 21st.

4(c)(2)(C)(ii) (repealed).

III. CONCLUSION

For the reasons discussed above, Defendant's Motion to Dismiss is GRANTED. Plaintiff's Motion to Amend the Scheduling Order and to Compel Production of Documents is DENIED. The Court hereby DISMISSES Plaintiff's claims WITHOUT PREJUDICE.

SO ORDERED.

GEORGE Z. SINGAL
United States District Judge

Dated this 5th day of October, 2000.

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plaintiff

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